IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

State of Arizona, Plaintiff- Appellant,	)	No. 1 CA-CV 12-0094
v.	)	Case No. S1400CR2011-00539
	)	Superior Court of the State of Arizona,
Valerie Ann Okun, Defendant- Appellee.	)	In and For the County of Yuma

Appellant's Opening Brief

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STATEMENT OF JURISDICTION

The Court of Appeals has jurisdiction to review a final order of the Yuma County Superior Court pursuant to A.R.S. § 12–2101(A)(1) and Rule 1, Arizona Rules of Civil Appellate Procedure.

STATEMENT OF THE CASE AND FACTS

In November 2010, Arizona voters passed Proposition 203, Arizona Medical Marijuana Act (AMMA), codified in Title 36, Chapter 28.1, A.R.S. §§ 36-2801, et seq. The AMMA gives some people limited protection from prosecution by the State. The possession, sale, delivery, or manufacture of marijuana remains a state crime in Arizona unless such use is within the specific restrictions set forth in the AMMA. A.R.S. § 36-2802(E).

On January 28, 2011, Valerie Okun (Okun) was stopped and searched by U.S. Border Patrol Agents at a U.S. Border Patrol checkpoint within Yuma County. (R. 29, p. 1.) During a search of the vehicle, hashish, marijuana, and drug paraphernalia were found. (Id.) Okun claimed that all of these items belonged to her. (Id.) Pursuant to protocol, the investigation and evidence were turned over to the Yuma County Narcotic Task Force.[1] (YCNTF) (R. 22, p. 2 ll. 17-19.) Okun was charged with three state felonies. (R. 1) Upon production of California

[1] The YCNTF is composed of the U.S. Drug Enforcement Administration, the U.S. Border Patrol, the Arizona Department of Public Safety, the National Guard, the City of Somerton Police Department, and the Yuma County Sheriff. See www.ycntf.org.

medical marijuana documentation, the State dismissed the case on or about May 19, 2011. (R. 12.) The State signed a property disposition form directed to the YCNTF advising that they may make immediate disposition of all property as they deemed proper. (R. 21, Exhibit A)

On August 15, 2011, Okun filed a Motion to Return the Defendant's Property. (R. 13.) On August 16, 2011, the State filed a Response taking no position on Defendant's motion. (R. 14.) The Trial court signed an order releasing Okun's property on August 17, 2011. (R. 15.) Yuma County Sheriff Ralph Ogden (Sheriff) was not mentioned in that order, nor was he a party to the litigation involved in the order. Referencing that Order, Okun's attorney sent a letter to the Sheriff on August 19, 2011, asking for release of said property. The Sheriff responded on the same date, indicating that (1) he would not return the marijuana, (2) that the property had been scheduled for delivery that same date to the U.S. Drug Enforcement Agency (DEA) for destruction, R. 21, Exhibit C., and (3) that he would hold off on delivery to the DEA for destruction until a final court decision was received. (R. 21, Exhibit D.)

On January 26, 2012, after further proceedings on the issue of whether the Sheriff could be ordered to return marijuana, the trial court issued an order specifically directing the Sheriff to turn over the marijuana to Okun. (R. 29.)

The Sheriff is hereby appealing that order.

STANDARD OF REVIEW

The resolution of this case depends on the interpretation of constitutional and statutory provisions, which are issues of law that the Court will review de novo. *Ross v. Bennett*, 228 Ariz. 174, 265 P.3d 356, 358 (2011).

ISSUES

I. The possession and delivery of marijuana is prohibited by federal law, and all judges in every state are bound by the laws of the United States, therefore the trial court's order requiring the Sheriff to deliver marijuana to Okun violates the trial court's obligation to follow federal law.

II. Okun's marijuana was summarily forfeited by A.R.S. 13-3413(C).

III. The Arizona Medical Marijuana Act does not require the Sheriff to deliver marijuana to Okun.

IV. Okun's marijuana is not a protected property right.

ARGUMENT

I. The Possession and Delivery of Marijuana is Prohibited by Federal Law, and All Judges in Every State are Bound by the Laws of the United States, Therefore the Trial Court's Order Requiring the Sheriff to Deliver Marijuana to Okun Violates the Trial Court's Obligation to Follow Federal Law.

A. The Distribution of Marijuana by the Sheriff to Okun, and the Possession of Marijuana by Okun, are Prohibited by the Controlled Substances Act.

The federal Controlled Substances Act, 21 U.S.C. § 801 et seq., makes it unlawful to possess, manufacture, distribute or dispense any controlled substance except in a manner authorized by the Controlled Substances Act. 21 U.S.C. §§ 841(a)(1), 844(a). The Controlled Substances Act provides that "[e]xcept as authorized by this title, it shall be unlawful for any person knowingly or intentionally - - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance …." 21 U.S.C. 812(a)(1). Simple possession of marijuana is a crime. 21 U.S.C. 844(a).

The Controlled Substances Act categorizes all controlled substances into five schedules with a Schedule I drug having the most restrictions. 21 U.S.C. § 812. Marijuana is classified as a Schedule I drug and has no approved use worthy of an exception outside the confines of a U.S. Government-approved research project. 21 U.S.C. §§841(a)(1), 812(b)(1)(B), 812(c), 823(f). Whereas some other

controlled substances can be dispensed and prescribed for medical use, 21 U.S.C. § 829, the same is not true for marijuana.

The Controlled Substances Act grants immunity for law enforcement purposes. The trial court addressed the immunity clause, 21 U.S.C. §885(d), but found no assurance that the Sheriff had immunity. Instead, the trial court stated that the Sheriff must return the marijuana because "[a]s a practical matter … it seems exceedingly unlikely that federal prosecutors would ever attempt to haul … into federal court for complying with a state judicial order calling for the return of a qualified patient's medical marijuana." (R. 29.)

The trial court's approach of weighing the likelihood of federal prosecution of the Sheriff, and the trial court's finding of unlikely, equates to a finding that the Sheriff is being ordered to violate the Controlled Substances Act.

The Sheriff is prohibited from delivering marijuana to a person he knows has no right to possess marijuana—even for medical purposes. Accordingly, the Sheriff would violate the Controlled Substances Act if he returns marijuana to Okun.

The Controlled Substances Act also prohibits Okun from possessing marijuana. The federal government has not recognized a legitimate medical use for marijuana and there is no exception for medical marijuana distribution or possession under the Controlled Substances Act. *Gonzales v. Raich*, 545 U.S. 1,

14–15 (2005). "[M]arijuana has no medical benefits worthy of an exception thus it has been held that there is no "medical necessity" defense available for charges under the Controlled Substances Act." *U.S. v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 491 (2001).

The trial court's order requires the Sheriff to deliver marijuana to Okun. Both the delivery by the Sheriff and the possession by Okun are violations of the Controlled Substances Act.

B. All Judges in Every State are Bound by the Laws of the United States.

State courts, unlike the state legislatures and state executives, are bound to follow federal law. *Printz v. U.S.*, 521 U.S. 898, 907 (1997). The source of the obligation is the United States Constitution, Article VI, clause 2, which provides that:

> This Constitution, and ***the Laws of the United States*** which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, ***shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby***, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [emphasis added]

Pursuant to this Constitutional provision, the Arizona Courts and the U.S. Supreme Court agree that state law is preempted when it is impossible to comply with both state law and federal law.

> Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually

> conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963)

Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978).

> Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963).

Fidelity Federal Sav. and Loan Ass'n v. de la Cuesta , 458 U.S. 141, 153 (1982).

> State law is preempted by federal law in three instances: (1) express preemption, . . .; (2) field or implied preemption, . . . ; and (3) conflict preemption, when state law actually conflicts with federal law. *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Com'n*, 206 Ariz. 399, 405, ¶ 18, 79 P.3d 86, 92 (App.2003)
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> * * * *
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> Actual conflict between federal and state law occurs, for purposes of preemption, when it is impossible to comply with both federal and state law, or "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hernandez–Gomez*, 201 Ariz. at 142–43, ¶ 3, 32 P.3d at 425–26.

Hutto v. Francisco, 210 Ariz. 88, 90, 107 P.3d 934, 936 (App. 2005)

C. How a Conflict Between Federal and State Law is Resolved.

In the instant case, the trial judge has interpreted the laws of Arizona to require the Sheriff to deliver marijuana to Okun. However, "where state and federal law 'directly conflict' state law must give way." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011); see also *Wyeth v. Levine*, 555 U.S. 555 (2009).

Because the trial court's order requires unequivocal violations of the Controlled Substances Act, the order is in direct conflict with federal law. This Court must resolve the conflict created by the trial court in favor of federal law, as required by Article VI, clause 2, of the United States Constitution.

II. Okun's Marijuana Was Summarily Forfeited by A.R.S. 13-3413(C).

The AMMA has no express provision for the return of seized marijuana. Instead, seized marijuana is subject to summary drug forfeiture.

The AMMA expressly prevents civil forfeiture.[2] A.R.S. § 36-2811(G) provides that "property, including all interest in the property, otherwise subject to forfeiture under title 13, chapter 39 . . . is not subject to seizure or forfeiture." It is important to note that civil forfeitures deal with items such as cash, automobiles, real property, etc., but not seized drugs.

A.R.S. § 13-3413(C) states in relevant part as follows:

> . . . marijuana, narcotic drugs and plants from which such drugs may be derived . . . which come into the possession of a law enforcement agency are summarily forfeited.

Under Arizona law, A.R.S. § 13-3413(C), it is clear that marijuana which comes into the possession of a law enforcement agency is summarily forfeited. Summarily is defined as "without ceremony or delay, short or concise." Black's

[2] For Civil Forfeitures, see Title 13, Chapter 39: A.R.S. § 13-4301, et seq.

Law Dictionary 1001 (6th ed. 1991). By operation of law, and without the usual formalities involved in forfeitures found under civil forfeiture, the marijuana is summarily forfeited.

A.R.S. § 13-3413(C) is not qualified by any exception and clearly requires the forfeiture of any "marijuana, narcotic drugs and plants" which comes into the possession of a law enforcement agency. In the case at bar, the marijuana and hashish are clearly in the possession of a law enforcement agency. As such, and according to A.R.S. § 13-3413(C), the marijuana and hashish have been summarily forfeited to the State.

The Arizona Legislature or the Arizona voters could have required or authorized the court to return confiscated marijuana.[3] However, this is not reflected in the AMMA. For example, the State of Oregon's Medical Marijuana Act specifically provides that in the event of a seizure of medical marijuana, the marijuana "shall not be harmed, neglected, injured or destroyed" by law enforcement, the marijuana may not be forfeited, and usable marijuana must be returned immediately upon determination that it was medical marijuana. O.R.S. § 475.323.

[3] Pursuant to Article VI, clause 2, United States Constitution, such an explicit provision in a state statute could still not be enforced in a state court if return of marijuana is prohibited by the Controlled Substances Act.

However, unlike Oregon law, the AMMA does not have a marijuana retur provision. The Arizona Courts should not rewrite the AMMA and ignore A.R.S. § 13-3413(C) to make the AMMA conform to a presumed intention that is not clearly expressed.

A.R.S. § 13-3413(C) clearly requires the forfeiture of the marijuana in the case at bar. No conflict exists between the AMMA and A.R.S. § 13-3413(C).

This Court should vacate the trial court's order and find that Okun's drugs are subject to the state's summary drug forfeiture provision of A.R.S. § 13-4313(C).

III. The Arizona Medical Marijuana Act Does Not Require the Sheriff to Deliver Marijuana to Okun.

The AMMA[4] does not expressly authorize the Sheriff or the trial court to transfer the marijuana or hashish to Okun. The AMMA only authorizes a "nonprofit medical marijuana dispensary" or a "registered designated caregiver" to transfer marijuana to a registered qualifying patient. Clearly, the Sheriff and the trial court cannot be considered as either a nonprofit medical marijuana dispensary, A.R.S. § 36-2801(11), or a registered designated caregiver, A.R.S. § 36-2801(5), under the AMMA. As no exception exists under the AMMA for the Sheriff or the trial court to transfer marijuana to Okun, and pursuant to A.R.S. §

[4] The AMMA was a voter approved measure. Many provisions that would further the medical use of marijuana may have been omitted in order to obtain the necessary voter support of the measure.

13-3405(A)(4), both the Sheriff and the trial court would be in violation of Arizona State law if they were to transfer marijuana to Okun. In addition, the Controlled Substances Act, 21 U.S.C. 841, makes it a crime to distribute or dispense a controlled substance.

IV. Okun's Marijuana is Not a Protected Property Right.

Although the AMMA may free Okun from State prosecution and civil forfeiture, Okun is not free from federal prosecution and state summary drug forfeiture. The Controlled Substances Act prohibits the possession of marijuana. Furthermore, 21 U.S.C. § 881 (a)(1), (f)(1), and (g) clearly identify that Okun has no property right in the confiscated marijuana and hashish, which is instead summarily forfeited and subject to destruction. For a state court to claim that Okun has a protected property right in her marijuana would require the state court to ignore the obvious, that state courts have an obligation to enforce federal penal laws. *Testa v. Katt*, 330 U.S. 386 (1947).

CONCLUSION

The trial court's order (1) directs violations of federal law; (2) does not conform to Article VI, clause 2, of the United States Constitution; (3) fails to follow the state law on summary forfeiture of drugs; and (4) unnecessarily extends the state medical marijuana rights beyond what was passed by the Arizona voters.

This Court should vacate the trial court's order, and find that the Sheriff cannot be ordered by an Arizona state court to return marijuana to Okun.

Dated this 27th day of April, 2012.

/s/ Edward P. Feheley
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CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 14, I certify that the attached brief uses proportionate spaced type 14 points or more, is double spaced using roman font and contains 3,154 words, and does not exceed 40 pages.

Dated this 27th day of April, 2012.

/s/ Edward P. Feheley
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